No. 2[illegible]

In the
Supreme Court of the United States

OCTOBER TERM, 1961

PORT ANGELES AND WESTERN RAILWAY COMPANY
and A. R. TRUAX, Trustee in Reorganization
and FIBREBOARD PRODUCTS, INC., *Petitioners*,

v.

ARTHUR A. ARNHOLD, *et al.*, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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THE ARGUS PRESS SEATTLE, WASHINGTON

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

The judgment below relates to a tort action involving a large forest fire in the Olympic mountains of the State of Washington in which the district judge found in favor of petitioners and of the United States of America (under the Tort Claims Act, 28 U.S.C. Secs. 2671-2680, sec. 1346(b); 62 Stat. 933, 982). The Circuit Court reversed the district judge with instructions to enter judgment against petitioners by reason of the negligence of the United States of America, purporting to "interpret" the findings of the district judge in such a way as to reach a result opposite to that reached

by the district judge. Motions for a rehearing and remanding of the case to the district judge for a clarification of his findings were denied with a dissenting opinion by one judge.

This is the only case found by petitioners which has been tried in the federal courts involving the liability of the federal government and other parties derivatively for the negligence of the federal government in fighting forest fires.

OPINIONS BELOW

The District Judge rendered a Memorandum Opinion, with amendments, and written Findings of Fact and Conclusions of Law, and a Judgment, which are set forth respectively in the Transcript of Record (R. 171, 238; 205, 227; and 215), and which is reported in 166 F. Supp. 373.

The opinion of the Court of Appeals is printed as Appendix A. hereto and is reported in 284 F.2d 326. The order of the Court of Appeals denying petitions for rehearing and remanding is printed as Appendix B hereto and is reported in 289 F.2d 924. The judgment of the Court of Appeals is printed as Appendix C hereto.

JURISDICTION

The opinion of the Court of Appeals was entered October 26, 1960, and the order denying petitions for rehearing is dated and was entered on May 10, 1961.

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

The statutes pertinent to this petition are 16 U.S.C. Sec. 572 pursuant to which the Forest Service of the United States of America was authorized to enter into a cooperative agreement with petitioners and others under Revised Code of Washington Sec. 76.04.400, 76.04-.060, and 76.04.070, whereby the United States of America assumed the duty, power or right to control forest fire fighting activities in the area involved in this cause. All the foregoing statutes are set forth in Appendix D.

QUESTIONS PRESENTED

1. Where a circuit court was admittedly in doubt as to the meaning of the significant findings of the district judge, should the circuit court overturn the judgment entered by the district judge without remanding the cause, thus depriving the district judge of the opportunity and litigants of the right to obtain a clarification and amplification of such findings by the district judge?

2. Does the refusal of the circuit court to apply the law of the State of Washington that liability does not rest in the negligent act, but upon proof that the act of negligence was the proximate cause, violate the duty of the circuit court to follow applicable state law?

3. Was the failure of the Circuit Court to follow the District Court's specific finding that the negligence of the Government was committed on August 6 and 7 and only while fighting the fire which was still wholly on Government land an interference with the fact finding function of the trial judge and, hence, a departure from the accepted and usual course of judicial proceedings?

4. Fibreboard and the railroad were involuntary members of the cooperative agreement and had a statutory right and duty to rely upon, and no right to interfere with, the control of the fire fighting assumed by the government under that agreement. Did the Circuit Court disregard applicable state law by holding Fibreboard and the railroad liable solely upon the negligence of the government?

STATEMENT OF THE CASE

This action was brought against petitioners and the United States to recover damages for property loss sustained by the respondents in a disastrous forest fire covering thousands of acres on the Olympic Peninsula in the State of Washington.

The case was tried to the court in an extensive trial lasting over two months, involving the testimony of 32 witnesses and some 4600 pages of transcript, and a tour of the fire area by the judge. On June 23, 1958, following conclusion of trial, the district judge filed a memorandum opinion (R. 171-205). On July 1, 1958, the judge filed findings of fact and conclusions of law. (R. 205-215). On July 10, 1958, judgment was entered dismissing the actions with prejudice (R. 215-217).

On July 18, 1958, the respondents filed a motion to amend the findings of fact, conclusions of law and judgment (R. 219-224, 473-479). On September 16, 1958, the court entered an order amending its previously filed memorandum opinion (R. 238-241) and Findings of Fact and Conclusions of Law (R. 227-237).

The judgment of the district judge dismissing respondents' actions was based upon the determination of the court that the damage to respondents' property was not proximately caused by the negligence of petitioners or the United States, and that the "sole proximate cause of the damages to plaintiffs in the amount stipulated herein [approximately $300,000.00] was the unforseeable and fortuitous combination of wind and weather conditions." (R. 213).

Upon appeal, the circuit court reversed and directed that judgment be entered against the United States by reason of the negligence of the Forest Service in fighting the forest fire. Petitioners were held liable solely because of the negligence of the United States. This decision was based upon an interpretation of the trial judge's findings. The language of the circuit court decision clearly indicates that the court was in doubt as to the meaning of certain crucial findings of the trial judge.

On May 10, 1961, petitions for rehearing were denied despite the admission of one judge of the substantiality of such doubt.

JURISDICTION OF DISTRICT COURT

The district court had jurisdiction over the subject matter of and the parties to this action under 28 U.S.C. secs. 1331, 1346(b) and 2671-80, commonly known as the Federal Tort Claims Act (R. 3, 171, 172; 236; 243) with respect to the United States of America, and under 28 U.S.C. sec. 1332 by reason of diversity of citizenship with respect to the petitioners (R. 172, 228, 229, 236).

REASONS FOR GRANTING THE WRIT

1. Where a circuit court was admittedly in doubt as to the meaning of significant findings of the district judge, should the circuit court overturn the judgment entered by the district judge without remanding the cause, thus depriving the district judge of the opportunity and litigants of the right to obtain a clarification and amplification of such findings by the district judge?

The United States Court of Appeals for the Ninth Circuit reversed the holding of the District Court only after stating that:

(a) "We do not believe that the district judge could ever have intended to make any such finding."

This referred to the clear findings of fact that no causal relationship existed between the initial lack of due care of the United States and the damages to respondent (Finding XVI, R. 234-5); and that the sole proximate cause was the fortuitous combination of wind and weather conditions which occurred on September 20 (Finding XVIII, R. 235-236).

(b) "* * * When the district court finds District Ranger Floe to be initially 'negligent,' we take it he means not negligent in the abstract, but negligent in the sense that such negligence subjected appellants' property to an unreasonable risk of fire loss."

There was ample evidence to support the crucial findings of fact in (a), and they were entirely consistent with the other findings of fact and conclusions of law of the district judge. Thus, in regard to those findings of fact, and although cloaking its action by

suggesting that it had divined the district judge's "intent," the Court of Appeals overrode a fundamental and unambiguous finding of fact, contravening the principles of normal appellate jurisdiction. Where a district court tries a case without a jury, its findings upon questions of fact are conclusive in courts of review, unless clearly erroneous. *State Farm Insurance v. Coughran*, 303 U.S. 485, 82 L.Ed. 970 (1938); *United States v. Jefferson Electric Manufacturing Co.*, 291 U.S. 386, 78 L.Ed. 859 (1934); *Dooley v. Pease*, 180 U.S. 126, 45 L.Ed. 457 (1901); *Davis v. Schwartz*, 155 U.S. 631, 39 L.Ed. 289 (1894); *Martinton v. Fairbanks*, 112 U.S. 670, 28 L.Ed. 862 (1885); *The Hypodame v. Chapin*, 6 Wall. 216, 18 L.Ed 794 (1868). This is so when the judgment of the trial court is couched in terms of a general verdict, and particularly so when detailed findings of fact support the conclusions of law, as in this case. *United States v. Jefferson Electric Manufacturing Co.*, 291 U.S. 386, 78 L.Ed. 859 (1934).

The effective overruling of the fundamental findings of fact by the Circuit Court here is a travesty that cannot be masked or justified by saying that the district judge could not have "intended" his unambiguous findings. Even if an ambiguity could be found that would allow arguments of intent to be intruded, the proper course would be to remand to the district judge to allow clarification of such ambiguity.

Remand was also clearly indicated by the ambiguity found by the Circuit Court in the finding of fact set out at (b). As was stated by Judge Pope in his dissent from denial of petitions for rehearing (Appendix B),

> "* * * as our opinion discloses, we had some difficulty in interpreting the findings of the district court and to a degree we modified them or put our own interpretation upon them."

In the opinion, the Circuit Court "take(s) it" that "negligent" as used in the finding set out at (b) means a lack of due care in terms of the damage which finally took place, when it is more persuasive that the trial judge's use of the term indicates a finding of an initial lack of due care which did not cause the damages.

This latter interpretation is much more consistent with the other findings of fact of the trial judge and with the disregarded Washington cases defining negligence in the latter sense. The proper action of the Circuit Court in the face of such an ambiguity was not to impose its own interpretation on the finding, particularly when the whole liability of the defendants rested upon that and related findings, but to remand to the District Court for amplification or clarification. Before the trial, District Judge Boldt spent two days traveling through and inspecting the far-flung mountainous area affected by the fire. There is no substitute for the background thus acquired, particularly in a fire in a rugged terrain. The failure of the Circuit Court to remand for clarification, as urged by Judge Pope, was a clear departure from the accepted and usual course of judicial proceedings, calling for the exercise of supervision of the United States Supreme Court.

2. The law of the State of Washington is that liability does not rest in the negligent act, but only upon proof that the act of negligence was the proximate cause. Does the refusal of the Circuit Court to apply this law, as recognized by the trial judge, violate the duty of the Circuit Court to follow applicable state law?

It is necessary in the State of Washington not only to prove negligence, but to show that the negligence in question was the proximate cause of the ultimate injury. *Udhus v. Peglow*, 55 Wn.2d 846, 350 P.2d 640 (1960). Proximate cause is defined by the Washington court as "that cause which, in natural and continuous sequence, unbroken by any new independent cause, produces the event, and without which the event would not have occurred." *Eckerson v. Ford's Prairie School District*, 3 Wn.2d 475, 101 P.2d 345 (1940).

The Circuit Court states that it was unable to cite any Washington cases using proximate cause "somewhat arbitrarily to cut off a liability that would otherwise rest upon a negligent actor." However, the only cases in Washington whose fact situations are directly in point hold that sudden and unexpected winds of high velocity which intervene to cause damage, notwithstanding efforts to contain or extinguish a fire, are a new, efficient intervening cause making ineffective and remote any prior negligence in fighting the fires. *Walters v. Mason County Logging Co.*, 139 Wash. 265, 246 Pac. 749 (1926); *Lehman v. Margott & Spencer Logging Co.*, 108 Wash. 319, 184 Pac. 323 (1919); *Stephens v. Mutual Lumber Co.*, 103 Wash. 1, 173 Pac. 1031 (1918).

Contrary to the explicit assumption in the Circuit

Court opinion, Washington, like New York, has consistently insisted the plaintiff has the burden of proving proximate cause, and when he fails to do so, as in this case, he cannot recover. In disregarding this body of state law, the Circuit Court violated the philosophy of *Erie Ry. v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188 (1938). The parties hereto are entitled to a decision based upon Washington law.

3. Was the failure of the Circuit Court to follow the District Court's specific findings that the negligence of the Government was committed on August 6 and 7 and only while fighting the fire which was still wholly on Government land an interference with the fact finding function of the trial judge and, hence, a departure from the accepted and usual course of judicial proceedings?

The Circuit Court stated in its opinion that:

> "The district court found the Forest Service negligent 'in its fire fighting action during the initial period August 6-10, in which interval the fire reached Fibreboard lands. . . ."

having apparently taken this time period from the district court's memorandum opinion, R. 191, 192, wherein the court arbitrarily grouped certain time periods of the fire for discussion purposes. The period of August 6-10 was the period frequently referred to by the trial court and counsel as a convenience, because it was the period within which the 60 acre Heckelville fire was contained within the 1600 acre area. The Circuit Court seized upon these dates, overlooking the fact that subsequent to the memorandum decision the district court entered specific Findings of Fact and Conclusions of Law and amended Findings of Fact and Conclusions

of Law in which it found that the negligence of the Government committed within the initial period was confined to August 6 and 7 and only while fighting the fire then entirely on Government land and before the fire came onto Fibreboard land. This is made clear in Amended Finding XVII, R. 235, and Amended Conclusion IV, R. 237:

> "Plaintiffs did not show by a preponderance of the evidence that defendant United States failed to use reasonable care in mop-up or other firefighting activities after August 7, . . ." (Amended Finding XVII)
>
> "Defendant United States was negligent in failing to use reasonable care in fighting the Heckleville fire on August 6 and 7." (Amended Conclusion IV)

The foregoing quotation emphasizes the trial judge's finding that the negligence of the Government occurred only on August 6 and 7, while the fire was on Government land consisting of the 60 acre Heckleville fire area.

The trial judge's later comment, made during one of the post-trial arguments, R. 292, shows his intent to find that the Government's negligence within the initial period was limited to the dates August 6 and 7, before the fire invaded Fibreboard lands:

> "THE COURT: I am concerned with whether I have used the right language to express what I found and believe. I am satisfied that the Forest Service in what I call 'the initial fire period,' August 6, 7, did not act as promptly and fully and effectively as reasonable care required."

If the Circuit Court had any doubt of the intention of the trial court in the face of these comments and specific findings it should have followed the simple expedient of remanding for clarification on the point.

4. Fibreboard and the railroad were involuntary members of the cooperative agreement and had a statutory right and duty to rely upon, and no right to interfere with, the control of the fire fighting assumed by the Government under that agreement. Did the Circuit Court disregard applicable state law by holding Fibreboard and the railroad liable solely upon the negligence of the Government?

Fibreboard had no choice but to become a member of the cooperative agreement and to allow the Forest Service to act as described by this court in *Rayonier, Inc. v. United States,* 352 U.S. 315, where it is said:

> "Shortly after the fire started United States Forest Service personnel appeared and took exclusive direction and control of all fire suppression activities."

The Court's concept of a non-delegable duty of a landowner and occupier in these circumstances is in conflict with Washington law.

Prior to 1929 the forestry laws of Washington specified what the landowner or occupier was to do on his own responsibility. Present statutes place the authority with the state fire wardens whose directions must be obeyed by the landowner. Specifying the duties of wardens, RCW 76.04.060 and RCW 76.04.070 require them to investigate all fires and "summon, impress and employ help in controlling fire." By impressing the employees of Fibreboard into their fire fighting ranks, the government assumed the responsibility for the abatement of the fire, a duty particularly prescribed for "uncontrolled fire" in RCW 76.04.380.

The whole philosophy of the present forestry laws

is entirely contrary to the old philosophy placing the responsibility of judgment on the shoulders of the landowner. The philosophy of the present law is that the public officials take care of the forest and supervise any fire fighting necessary. Under the present statutes the standard of due care is prescribed to be the judgment of the state supervisor of forestry. The Forest Service was acting in place of the state fire warden by virtue of the terms of the coperative agreement authorized by RCW 76.04.400 and 16 U.S.C. 572, which latter statute is intended to protect Forest Service land.

Neither petitioners nor any other members of the cooperative agreement had any right, duty or power to control the activities of the Forest Service in its fire suppression efforts. By the terms of the cooperative agreement and the state statutes, the Forest Service was empowered to and did summon, impress and employ men and equipment of parties to the agreement into its service. Thereafter, those non-government employees were as powerless to countermand Forest Service orders as is a conscript to change the orders of his commanding officer.

The district court's specific finding XIV, R. 212, and finding XV, R. 234, that:

> "Plaintiffs did not show by a preponderance of the evidence that defendant Fibreboard failed to use ordinary care in any of the particulars of negligence alleged by plaintiffs."

was not clearly erroneous and should not have been disturbed.

It was never suggested prior to the Circuit Court opinion that Fibreboard, the railroad, or any other member of the cooperative agreement, was liable because of the Government's alleged negligence in performing its duties under that cooperative agreement.

In holding Fibreboard and the railroad liable for or because of the Government's negligence the Circuit Court injects a theory into the case that had not heretofore been asserted or contended for by any party. This matter was not considered by the District Court, because there was no issue before it on this point. It is well settled that a new issue should not be injected into the case by the reviewing court to support a reversal as distinguished from an affirmance of the district court. To hold otherwise would subject a litigant to liability on a theory against which it had no opportunity to defend. This issue should not have been raised by the Circuit Court for the first time in the history of this litigation without giving petitioners and the trial judge an opportunity to consider it.

Apart from the impact upon petitioners, the Circuit Court's decision produces uncertainty and creates unintended and far-reaching implications of liability for the states and many large and small timber owners who seek to minimize the risk of forest fires under cooperative fire fighting agreements. In its laudable desire to protect national forests by the enactment of 16 U.S.C. 572, Congress did not intend to impose new and far-reaching liabilities upon states and individual timber owners who might enter into cooperative agreements with the federal government

in order to accomplish this objective. This is true regardless of the fact that the responsibility of the federal government was thereby enlarged. The resulting liability of the government in this case for its own negligence should not be extended to petitioners and countless other private owners. This unintended result is of concern to all timber owners in or near national forests and naturally could not be raised by the government or the plaintiffs in this case. Even Rayonier, who the Circuit Court said had a right to rely upon the government's assumption of this duty, is potentially hurt by the impact of the Circuit Court's opinion creating this new liability on private owners.

If the Circuit Court opinion were to become the law, thereafter every member of a cooperative agreement across or upon whose lands the Government fights a forest fire will be responsible for the negligence of the Government without being able to do anything about it. The obvious effect of the Circuit Court opinion on the "public interest" referred to in 16 U.S.C. 572 requires review by this court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 3, 1961.

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